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No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1950

J. J. O'LEARY, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, PETITIONER

v.

BROWN-PACIFIC-MAXON, INC., A CORPORATION, AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of J. J. O'Leary, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered in the above-entitled case on May 26, 1950.

OPINIONS BELOW

The District Court for the Western District of Washington, Northern Division, did not render an opinion. The opinion of the Court of Appeals for the Ninth Circuit (R. 63) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1950 (R. 66). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The question presented is whether, in the administration of the federal workmen's compensation laws, a court of appeals may substitute its judgment for that of the statutory administrative agency, a deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act, with respect to whether an employee's death arose out of and in the course of his employment, where the administrative determination is supported by substantial evidence and has a rational basis in the law.

STATUTES INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Act (Act of March 4, 1927, 44 Stat. 1424, as amended; 33 U. S. C. 901, *et seq.*) and the Act of August 16, 1941, as amended (56 Stat. 1035, 42 U. S. C. 1651, *et seq.*) are set forth in the Appendix.

STATEMENT

This action was brought by the employer and insurance carrier to set aside and enjoin the enforcement of a compensation award of $9.38 per week made by a deputy commissioner under the Longshoremen's and Harbor Workers' Act to the surviving dependent mother of John Valak, a deceased employee (R. 2–11). At the time of his death, Valak was employed at Guam, Marianas Islands, by Brown-Pacific-Maxon, Inc., a government contractor covered by the workmen's compensation provisions of the Longshoremen's and Harbor Workers' Act (R. 2, 8). The employer maintained and supervised a recreation center at Camp Ethridge on the Island of Guam for the benefit of its employees and others (R. 8). A swimming pool was among the facilities provided at the center (R. 41, 64), and a camp manager, life guards, security police, and first aid personnel, among others, were maintained at the center in respondent's employ (R. 41, 42, 48). The employer also provided a bus for the free transportation of its employees to and from the recreation center (R. 9, 64).

On the day in question the employee was making use of the recreational facilities provided by his employer (R. 9). As he and other employees were preparing to leave the recreation center by company bus, cries for help were heard from off-shore reefs (R. 9, 65). Valak and others

went to the assistance of the persons in distress, and he lost his life in the attempted rescue (R. 9, 65). Following this unsuccessful attempt, a rescue squad was organized by the camp manager and the superintendent, who were employed by respondent, and a number of other persons who likewise attempted the rescue were saved by the guards and security police (R. 48, 65).

The deputy commissioner found as a fact at the time of his death Valak was using the recreational facilities sponsored and made available by the employer for his employees and that this use was an incident of his employment (R. 9). Accordingly, he found that the employee's death arose out of and in the course of his employment and made a compensation award to his surviving dependent mother (R. 9, 10). Respondents attacked the award before the district court on the ground that the employee's death did not arise out of or in the course of his employment (R. 6). After considering the evidence given before the deputy commissioner, which had been made a part of the complaint, the district court found that there was "substantial evidence contained in the hearings * * * to sustain the compensation order" (R. 13), and, accordingly, dismissed the complaint and confirmed the award (R. 13–16).

Without passing upon the substantiality of the evidence before the deputy commissioner or the finding of the district court that there was substantial evidence to sustain the compensation

award, the court of appeals made its own analysis and appraisal of the evidence (R. 64–65). The court agreed that the use of facilities provided by an employer for his employee's recreation "is an incident of his employment", but did not "agree with the commissioner" that the attempted rescue was incidental to the use of the recreation facilities (R. 65). It reached the conclusion that the rescue attempt which resulted in Valak's death "was an act entirely disconnected from any use for which the recreational camp was provided and not in the course of Valak's employment" (R. 65). Accordingly the judgment of the district court was reversed and the compensation order set aside (R. 65).

REASONS FOR GRANTING THE WRIT

The failure of the court below to give conclusive effect in the circumstances of this case to the deputy commissioner's finding that the employee's death arose out of and in the course of employment presents a square conflict with the recent decision of this Court in *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, as well as earlier decisions to the same effect. *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 166; *Del Vecchio* v. *Bowers*, 296 U. S. 280; *South Chicago Coal and Dock Co.* v. *Bassett*, 309 U. S. 251; *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 246; *Davis* v. *Department of Labor*, 317 U. S. 249. If permitted to stand unreversed, the

encouragement it will provide to relitigating in the lower and appellate courts administrative interpretations of borderline questions of scope of employment will present a serious obstacle to the achievement of a fundamental objective of this and all workmen's compensation statutes—to provide a "prompt" and "inexpensive" method for dealing with workmen's compensation claims. *Crowell* v. *Benson,* 285 U. S. 22, 45–47.

The narrow scope of judicial review of administrative determinations with respect to the scope of employment was delineated with clarity and emphasis in *Cardillo* v. *Liberty Mutual Company, supra.* The Court there pointed out that "the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law" (p. 478), that "if supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of or in the course of employment is conclusive (p. 477), that it is immaterial that "the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted" (p. 478); and that the rule is the same "even if such an inference be considered more legal than factual in nature" (p. 478) so long as "there is factual and legal support for that conclusion" (p. 479).

The lower court's approach to this case was in complete disregard of these well-established and recently reiterated principles. Without even passing reference to the traditional rule of administrative finality, the court embarked upon its own reexamination and reappraisal of the evidence, drew its own inferences therefrom and reached the conclusion that the employee's death did not arise out of and in the course of his employment. The court below did not disagree that the use of recreational facilities provided by his employer was an incident of his employment (R. 65). This, of course, is a well-established principle of workmen's compensation law. *Liberty Mutual Insurance Company* v. *Gray, Deputy Commissioner,* 137 F. 2d 926 (C. A. 9); *Linderman* v. *Cownie Furs,* 234 Ia. 708; *LeBar* v. *Ewald Bros. Dairy,* 217 Minn. 16; *Kenney* v. *Lord & Taylor Inc.,* 254 N. Y. 532; *Brown* v. *United Services for Air Inc.,* 273 App. Div. 932; *Wilson* v. *General Motors Corp., Chevrolet Motor & Axle Division,* 272 App. Div. 845; *Fagan* v. *Albany Evening Union Co.,* 261 App. Div. 861; *Holst* v. *New York Stock Exchange,* 252 App. Div. 233; *Dowen* v. *Saratoga Springs Commission,* 46 N. Y. S. 2d 822 (1944); *Ott* v. *Industrial Commission,* 83 Ohio App. 13. It held, however, that it could not agree with the deputy commissioner that the employee's going to the rescue of a drowning individual while thus

present at the recreation camp was in the course of his employment.

The circumstances of the case clearly furnished an ample factual basis for the deputy commissioner's determination that the employee's death arose out of and in the scope of his employment. Employment at an island base thousands of miles removed from the homeland necessarily creates unusual conditions, in which the relation between employer and employee undoubtedly covers a far greater area than under ordinary conditions. In the present situation the employer's traditional function was considerably enlarged, with correspondingly greater responsibilities. Although subject to the control of the Navy, Camp Ethridge was under the immediate supervision of the employer (R. 41). All employees at the Camp were employed by the employer, including a camp manager, superintendent, security police necessary to maintain order, first-aid personnel, life guards, cooks and waiters (R. 41–42). Furthermore, it is reasonably clear from the rescue activities of the camp manager, medical officer, life guard, and other employees that the employer was charged with responsibility for the safety of persons in the area of the recreation center and the surrounding waters (R. 45–48, 50, 51). Thus, when the employee met his death he was apparently serving the interests of his employer.

Regardless of possible differences of opinion as to the correct inference, therefore, it is clear that no rule of law precludes a determination that an employee's injury or death arises out of and in the course of employment incurred while attempting a rescue in circumstances in which the employer has a responsibility to act. Response to an emergency, although not a necessary part of the employee's duties, has frequently been held within the scope of employment for purposes of determining compensability where some interest of the employer is deemed to be involved. *Baum* v. *Industrial Commission,* 288 Ill. 516; *Howell* v. *Craig Colony and State Insurance Fund,* 255 App. Div. 908; *Mobile Liners, Inc.* v. *McConnell,* 220 Ala. 562; *Rzepczynski* v. *Manhattan Brass Company,* 179 App. Div. 952; *Re James Nellis,* April 1915, Opinions of Solicitor of United States Department of Labor 221; *Belle City Malleable Iron Co.* v. *Rowland,* 170 Wis. 293; *Southern Surety Company* v. *Stubbs,* 199 S. W. 343 (Tex. 1917); *Munn* v. *Industrial Board,* 274 Ill. 70; *Johnson* v. *Chicago & N. W. Ry. Co.,* 69 S. D. 111, 7 N. W. 2d 145 (1942). This has been true where it resulted from responding to an emergency where the employer's interest has been tenuous (*Van Ness* v. *Borough of Haledon,* 136 N. J. L. 623, 56 A. 2d 888 (1948); *Travelers Insurance Company* v. *Dudley,* 180 Tenn. 191, 173 S. W. 2d 142 (1943)), or nonexistent (*Puttkammer* v. *Industrial Commission,* 371 Ill. 497, 21 N. E.

2d 575 (1939)). Clearly the deputy commissioner's determination in the present case is supported by evidence, "is not forbidden by law," and rests upon "a reasonable legal basis." *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. at 478, 479.

The substantial importance of the present case does not rest solely upon the need for maintaining the principles of limited judicial review reiterated in the *Cardillo* case in order to safeguard the statutory plan for providing a "prompt" and "inexpensive" remedy in workmen's compensation cases (*Crowell* v. *Benson*, 285 U. S. 22, 45–47). We are advised by the Bureau of Employees' Compensation of the Department of Labor that emergency situations frequently confront employees while at work and that the substantive question here involved is one of large and recurring importance under the Federal workmen's compensation laws. The question arises quite frequently in connection with employment not only under the Longshoremen's and Harbor Workers' Compensation Act throughout the Nation and under the District of Columbia Workmen's Compensation Law (45 Stat. 600, D. C. Code, 1940, Sec. 36–501), but even more particularly under the Defense Bases Act, which renders the Longshoremen's Compensation Act applicable in proper circumstances throughout the world.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1950.

APPENDIX

1. The Defense Bases Act of August 16, 1941, as amended, 56 Stat. 1035, 42 U. S. C. 1651 *et seq.*, provides in part:

* * * * *

That (a) except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any employee engaged in any employment—

(1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or

(2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States (including Alaska; the Philippine Islands; the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone); or

(3) upon any public work in any Territory or possession outside the continental United States (including Alaska; the Philippine Islands; the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone), if such employee is engaged in employment at such place under the contract of a contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) with the United States; but nothing in this paragraph shall be

construed to apply to any employee of such a contractor or subcontractor who is engaged exclusively in furnishing materials or supplies under his contract;

* * * * *

2. The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424, as amended, 33 U. S. C. 901 *et seq.*) provides in part:

SEC. 2. DEFINITIONS.—When used in this Act—

* * * * *

2. The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

SEC. 3. COVERAGE—(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

* * * * *

SEC. 19. PROCEDURE IN RESPECT OF CLAIMS—(a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commis-

sioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

* * * * *

SEC. 21. REVIEW OF COMPENSATION ORDERS—

* * * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). * * *

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